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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

LIBERTY MUTUAL INSURANCE
COMPANY,

Plaintiff,

vs.

MICHAEL T. BLATT,

Defendant.

Case No. C 06 2022 SC

Date: October 26, 2007

Time: 10:00 a.m.

Courtroom: 1

**REPLY BRIEF IN SUPPORT OF
LIBERTY MUTUAL'S MOTION
FOR SUMMARY JUDGMENT OR
SUMMARY ADJUDICATION**

Hon. Samuel Conti

Trial: November 19, 2007

Plaintiff, Liberty Mutual Insurance Company, hereby submits the following reply brief in support of its motion for summary judgment or adjudication.

Dated: October 16, 2007

KRING & CHUNG, LLP

By: 

J. Christopher Bennington

Ronald J. Skocypec

Attorneys for Plaintiff

LIBERTY MUTUAL INSURANCE
COMPANY

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INTRODUCTION

This case exemplifies the old saw that "no good deed goes unpunished." Liberty Mutual Insurance Company defended Mr. Blatt against the underlying litigation after properly reserving its rights, including the right to seek reimbursement of fees and costs spent to defend uncovered claims. The jury verdict in the underlying case established as a matter of law that Liberty Mutual never had an obligation to defend Mr. Blatt, yet to avoid claims of bad faith and threats to execute on Mr. Blatt's personal property, Liberty Mutual advanced on behalf of Mr. Blatt the attorney's fees and costs awarded to the underlying plaintiffs.

Now, Mr. Blatt argues that because Liberty Mutual once accepted the defense it has no right to seek reimbursement under Buss v. Superior Court, 16 Cal.4th 35, 65 Cal.Rptr.2d 366 (1997), and because it advanced payment of the fees and costs awarded in the underlying case it is now estopped from seeking reimbursement of those sums, as well. In other words, defendant now argues that Liberty Mutual loses because it faithfully discharged whatever obligations it might have owed to Mr. Blatt.

Defendant's position stands California insurance law on its head. Liberty Mutual did what it was supposed to do: it reserved its rights, and it defended its (additional) insured. It is now entitled to recover the sums it paid given the determination that it never had a duty to defend Mr. Blatt.

There are several basic facts that defendant does not challenge, and they are dispositive of the issues in this case:

1 1. Mr. Blatt was an additional insured under a policy issued to Schnabel
2 Foundation, and Liberty Mutual had no obligation to defend him save for
3 claims of "liability arising out of [Schnabel's] operations or premises owned or
4 rented to [Schnabel]." If Schnabel was not liable, then Liberty Mutual had no
5 ultimate obligation to Mr. Blatt;

6
7 2. The jury's verdict exonerating Schnabel established as a matter of
8 law that Liberty Mutual had no duty to defend or indemnify Mr. Blatt because
9 a finding on the merits that there was no liability on the part of Schnabel
10 means *a fortiori* that Mr. Blatt's liability could not arise out of Schnabel's
11 operations;

12
13 3. The attorneys fees and costs paid to the underlying plaintiffs
14 awarded weeks or months after the jury returned its verdict and established
15 that there was no liability arising out of Schnabel's operations;

16
17 4. The attorneys fees were awarded to the underlying plaintiffs
18 because of the terms of the contract between them and Mr. Blatt;

19
20 5. The attorneys fees and costs awarded to the underlying plaintiffs
21 were paid under the supplementary payments section of the Liberty Mutual
22 policy as an element of the costs of defense;

23
24 6. Liberty Mutual properly reserved its right to seek reimbursement
25 from Mr. Blatt; and

26
27 7. Liberty Mutual is entitled to prejudgment interest on those sums
28 recovered from defendant.

1 **I. LIBERTY MUTUAL IS ENTITLED TO FULL**
2 **REIMBURSEMENT OF ALL SUMS PAID TO THE**
3 **UNDERLYING PLAINTIFFS.**
4

5 Liberty Mutual was only obliged to defend and indemnify Mr. Blatt to
6 the extent that his liability arose out of the operations of Schnabel. The jury
7 verdict, which established that there was no liability to any party arising out of
8 Schnabel's operations, was returned on February 27, 2004. (Exhibit E.) As
9 of that date, as a matter of law Liberty Mutual had no further obligation to
10 defend or indemnify Mr. Blatt.¹ As the California Supreme Court made clear
11 in Montrose Chemical Corp. v. Superior Court, 6 Cal.4th 287, 295, 24
12 Cal.Rptr.2d 46 (1993), the carrier's duty to defend continues "until the
13 underlying lawsuit is concluded . . . or until it has been shown that there is *no*
14 potential for coverage." (Emphasis in original.) Even defendant concedes
15 that Liberty Mutual had no further or "prospective" defense obligation going
16 forward after the jury verdict. (Opposition p. 2, ll. 6-21.)
17

18 The underlying plaintiffs' court costs and attorney's fees were awarded
19 after a hearing on May 4, 2004, and the judgment including the award of
20 costs and fees was signed by the trial court on June 30, 2004. (Exhibit F.)
21 Liberty Mutual later made payments to the underlying plaintiffs for their costs
22 and attorney's fees. (Baker declaration, para. 6.) All of these events
23 occurred after the jury verdict had established that there was no duty to
24

25 _____
26 ¹ Of course, it is Liberty Mutual's position that the jury verdict established as a matter of
27 law that there had *never* been a duty to defend, and that issue is addressed below.
28 However, there is no argument – and none offered by defendant – that the jury verdict at a
minimum established that there was no further or prospective obligation to defend Mr.
Blatt after February 27, 2004.

1 defend.

2
3 Once the facts demonstrate that a carrier has no potential for coverage,
4 the carrier is free to withdraw from the defense of the insured. See, for
5 example, Ringler Associates Inc., v. Maryland Casualty Co., 80 Cal.App.4th
6 1165, 1186-87, 96 Cal.Rptr.2d 136 (2000). On the other hand, a carrier is
7 not obliged to withdraw its defense as a predicate for seeking reimbursement
8 from its insured.² The Ringler court noted that "in order to avoid any
9 possibility of liability for bad faith . . . it may be prudent for an insurer to obtain
10 a declaratory judgment that it has no duty before unilaterally withdrawing
11 from a defense. . . ." Id. at 1192. The carrier may instead reserve its rights,
12 defend the insured, and then seek reimbursement from the insured of sums
13 the carrier was not ultimately obliged to spend. Scottsdale Ins. Co. v. MV
14 Transportation, 36 Cal.4th 643, 649, 31 Cal.Rptr.3d 147 (2005). That is
15 exactly what Liberty Mutual did in this case. Defendant's suggestion that
16 Liberty Mutual's payment somehow bars its Buss reimbursement claim would
17 render the Buss decision completely meaningless.

18
19 Moreover, this very issue – the payment of attorney's fees and costs to
20 a claimant when it has been determined that there is no duty to defend the
21 insured – was resolved by the Court of Appeal in Golden Eagle v. Cen-Fed,
22 Ltd., 148 Cal.App.4th 976, 56 Cal.Rptr.3d 279 (2007). It is on all fours and
23 establishes Liberty Mutual's right to seek reimbursement for the fees and
24

25
26 ² Defendant suggests in his opposition that Liberty Mutual's decision not to withdraw is
27 somehow demonstrative of its ultimate duty to defend. "Significantly, Liberty Mutual never
28 withdrew their [sic] defense of the case. It necessarily follows that Liberty Mutual
determined that the damages were covered under the terms of the policy." (Opposition,
page 14, ll. 17-19.)

1 costs paid to the underlying plaintiffs.³

2
3 Defendant argues that Liberty Mutual has either waived its claim for
4 reimbursement or is estopped from seeking such relief.⁴ But to hold that
5 there has been a waiver, a court must find "the intentional relinquishment of a
6 known right after knowledge of the facts. The burden . . . is on the party
7 claiming a waiver of a right to prove it by clear and convincing evidence that
8 does not leave the matter to speculation, and doubtful cases will be decided
9 against a waiver." Waller v. Truck Ins. Exchange, 11 Cal.4th 1, 31, 44
10 Cal.Rptr.2d 370 (1995). That burden cannot be met in the present case
11 where Liberty Mutual fully reserved its rights in writing to seek
12 "reimbursement" from Mr. Blatt.

13
14 The estoppel argument must also fail. An equitable estoppel requires a
15 showing of "detrimental reliance." Id. at 34. Defendant suggests that Liberty
16 Mutual "never notified Blatt . . . that it would seek reimbursement" of the
17 amounts paid to the underlying plaintiffs. (Opposition p. 13, ll. 8-10.) But this
18 ignores the fact that Liberty Mutual provided its defense under an express
19 reservation of its right to seek reimbursement. How could Blatt have
20 detrimentally relied on Liberty Mutual's actions and concluded that plaintiff
21 would not seek reimbursement when it expressly reserved its right to do so?

22
23 ³ Defendant suggests that Liberty Mutual's reliance on Cen-Fed is "misplaced," and
24 insists that the Cen-Fed "trial court found that there was no duty to defend under the
25 policy, yet held that the insurer had to pay attorneys fees pursuant to contract."
26 (Opposition, p. 9, ll. 20-22.) That is what the Cen-Fed trial court found, and that ruling
was reversed by the Court of Appeal. How that result allegedly supports defendant's
position in *this* case is unclear.

27 ⁴ Defendant appears to use the terms "waiver" and "estoppel" interchangeably. The
28 heading in the Opposition points and authorities refers to estoppel, but defendant cites his
affirmative defenses of estoppel and waiver. (Opposition, p. 12, ll. 26-28.)

1 Blatt asserts that he could have negotiated with the underlying plaintiffs for
2 some discount of the fees and costs, but this assertion is offered without one
3 whit of evidence or support.

4
5 Finally, defendant's waiver/estoppel position is disingenuous since Mr.
6 Blatt *demand*ed that Liberty Mutual pay the entire judgment against him,
7 including the attorney's fees and costs awarded to the underlying plaintiffs.
8 (Bennington supplemental declaration.) How can defendant accept a
9 defense under a reservation of rights, fail to establish the predicate for any
10 coverage whatsoever (liability arising from the operations of the named
11 insured, Schnabel), demand that the carrier nevertheless pay for an award of
12 attorney's fees and costs, and then argue in *equity* that the carrier is
13 estopped from seeking reimbursement because it acceded to defendant's
14 demands and advanced the payment?

15
16 In summary, Liberty Mutual reserved its right to seek reimbursement of
17 all defense costs spent on uncovered claims. The jury verdict established –
18 at a minimum – that Liberty Mutual had no obligation to defend defendant
19 going forward. The attorney's fees and costs awards were made *after* the
20 jury verdict was returned. The awards were an element of the costs of
21 defense.⁵ Defendant demanded that Liberty Mutual pay the attorney's fees
22 and costs awards. Liberty Mutual advanced the payments, but never
23 withdrew its reservation of rights.

24
25
26
27 ⁵ This fact is established by the holdings in Prichard v. Liberty Mutual Ins. Co., 84
28 Cal.App.4th 890, 101 Cal.Rptr.2d. 298 (2000) and Cen-Fed, and it is never challenged by
defendant in his opposition.

1 Under the circumstances, Liberty Mutual is clearly entitled to
2 reimbursement of all defense costs incurred after the jury's verdict in the
3 underlying case, including the awards to the underlying plaintiffs. It had no
4 obligation to make the payments, and it properly reserved its right to seek
5 repayment from defendant.

6
7 **II. LIBERTY MUTUAL IS ENTITLED TO FULL**
8 **REIMBURSEMENT OF ALL FEES AND COSTS PAID TO**
9 **DEFEND MR. BLATT IN THE UNDERLYING LITIGATION.**
10

11 Liberty Mutual maintains that it is entitled to a full reimbursement of all
12 defense fees and costs incurred on behalf of Mr. Blatt because the jury
13 verdict in the underlying case established – as a matter of law – that there
14 had never been a potential for coverage under the Liberty Mutual policy.
15 Defendant does not challenge that in some cases at least, a carrier is entitled
16 to a full reimbursement of all defense fees and costs. This was made clear in
17 Scottsdale and Cen-Fed, where events demonstrated that there was never
18 any coverage in the first place.

19
20 This is one of those cases. Notably, this is not a "standard"
21 construction defect case where a carrier defends its own named insured
22 against claims of negligence. Mr. Blatt was an additional insured under the
23 policy issued to Schnabel, and he was only entitled to coverage to the extent
24 that liability arose out of Schnabel's operations. Thus, to demonstrate even a
25 potential for coverage, defendant had to establish that the claims were
26 generally covered under the terms of the policy *and* that the claims arose out
27 of something that Schnabel did. The jury verdict established as a matter of
28 law that Mr. Blatt could never have met that second requirement because

1 while the jury found Mr. Blatt was liable, none of the damages that were
2 awarded related to Schnabel's operations. Thus, defendant has failed to
3 meet the threshold test for coverage under the Liberty Mutual policy.⁶
4

5 Defendant never really comes to grips with this argument. He asserts
6 only that there must have been potential for coverage at the outset because
7 Liberty Mutual agreed to defend him, and that the duty to defend is only
8 extinguished prospectively. In many cases, he would be correct. But not in
9 this case, where the jury verdict established as a matter of law that there was
10 no coverage or potential for coverage from the outset.
11

12 Defendant argues, "A jury verdict is necessarily later in times that the
13 insurer's determination of its duty to defend. The fact that the insured is later
14 exonerated does not alter whether the facts triggered a duty to defend in
15 advance of the jury verdict." (Opposition, p. 2, ll. 8-11.) As to the *named*
16 insured, Schnabel, this is a correct statement of the law. But Mr. Blatt was
17 not a named insured; rather he was an *additional* insured whose coverage
18 was conditioned on establishing that his liability arose out of Schnabel's
19 operations. Compared with the named insured, there is an additional hurdle
20 that Mr. Blatt, as the additional insured, must surmount to establish even a
21 potential for coverage under the policy – that the claim stemmed from
22 something Schnabel did.
23
24

25 ⁶ The burden to establish that a claim is covered in the first instance under the insuring
26 clause of a policy rests with the insured. Aydin Corp. v. First State Ins. Co., 18 Cal.4th
27 1183, 1188, 77 Cal.Rptr.2d 537 (1998). The burden only shifts to the insurer once the
28 insured has made that demonstration of coverage. Montrose, supra, 6 Cal.4th at 304.
Defendant cannot make that demonstration because of the jury verdict in the underlying
case.

1 The jury verdict exonerated Schnabel. It did not exonerate Mr. Blatt.
2 But by exonerating Schnabel, the jury eliminated that condition precedent for
3 any coverage for Mr. Blatt under the policy.
4

5 Mr. Blatt implicitly insists that he should be treated in the same manner
6 as the named insured. He says, in essence, "I am an insured, the policy
7 covers property damage, there is a claim for property damage, so defend
8 me." But this position ignores the limiting language in the additional insured
9 endorsement, which restricts coverage to claims for "liability arising out of
10 [Schnabel's] operations. . . ." It is a basic tenet of policy interpretation that a
11 court should interpret a policy in context and give effect to *all* parts of the
12 policy. See, for example, Palmer v. Truck Ins. Exchange, 21 Cal.4th 1009,
13 1115, 90 Cal.Rptr.2d 647 (1999). Defendant's interpretation makes the
14 limiting language of the additional insured endorsement meaningless.
15

16 Finally, the duty to defend "rests on the fact that the insurer has been
17 paid premiums by the insured for a defense." Buss, supra, 16 Cal.4th at 47.
18 In this case, Mr. Blatt has paid nothing. Schnabel paid premium to buy a
19 defense for claims made against it, and, arguably, it paid premium to buy a
20 defense for additional insureds against claims "arising out of [Schnabel's]
21 operations. . . ." *But nobody paid any premium to defend Mr. Blatt against*
22 *claims that had nothing to do with Schnabel's operations.* Where "none of
23 the claims is even potentially covered, the insurer does not have a duty to
24 defend." Id.
25

26 The jury verdict in the underlying case has established as a matter of
27 law that there was never a potential for coverage for the claims made against
28 Mr. Blatt. Thus, Liberty Mutual never had a duty to defend, and it is entitled

1 to reimbursement of all the costs of defense incurred on behalf of the
2 defendant.

3
4 **III. SOLELY IN THE ALTERNATIVE, LIBERTY MUTUAL IS**
5 **ENTITLED TO FULL REIMBURSEMENT OF ALL**
6 **DEFENSE FEES AND COSTS SPENT ON CLAIMS**
7 **UNRELATED TO SCHNABEL'S OPERATIONS.**
8

9 Even if the court were to find that Liberty Mutual had an obligation to
10 defend some of the claims made against Blatt prior to the date of the jury's
11 verdict, that does not mean that there was a duty to defend all of the claims.
12 It is the basic holding of Buss that a carrier can recover that portion of the
13 fees and costs spent on the defense of uncovered *claims*.⁷
14

15 Defendant argues that Liberty Mutual must pay all of the costs of
16 defense – or at least those incurred before the jury's verdict – because
17 Schnabel was allegedly responsible for the water damage and claims of
18 water damage appeared in all of the *causes of action*. If such allegations
19 appear in all causes of action, defendant reasons that all *claims* must be
20 potentially covered.⁸ This reading is not tenable.
21

22
23 ⁷ "As to the *claims* that are not even potentially covered, . . . the insurer may seek
24 reimbursement for defense costs. . . . The reason is this. Under the policy, the insurer
25 does not have a duty to defend the insured as to *claims* that are not even potentially
26 covered. With regard to defense costs for these *claims*, the insurer has not been paid
27 premiums by the insured. It did not bargain to bear these costs." Buss, supra, 16 Cal.4th
28 at 50-51, emphasis added.

⁸ ". . . [A]s the court can plainly see from the Gabbert and Lincoln complaint in the
underlying action, the allegations of water intrusion applied to *all* causes of action and
thus *all* claims were potentially covered in this case, preventing Liberty Mutual from
collecting any amount paid for Blatt's attorneys fees." (Opposition, p. 3, ll. 4-8.)

1 The Supreme Court in Buss took pains to describe the difference
 2 between covered and uncovered "claims." It did not distinguish between
 3 covered and uncovered "causes of action." The instant case is a classic
 4 illustration of why the Court chose to use the term "claims."

5
 6 Schnabel built a wall. It was apparently alleged that the wall was in
 7 some way defective and this led to some water intrusion. Yet, water damage
 8 was not the only claim at issue in the underlying case. At a minimum,
 9 defendant concedes that he was facing claims that his condominiums failed
 10 to comply with applicable building codes, did not have proper ventilation, and
 11 were not structurally sound. (Opposition, p. 4, n.1.) Schnabel's work had
 12 nothing to do with building codes, ventilation or structural integrity of the
 13 condominiums themselves, as is clear from a review of the Schnabel-Blatt
 14 contract. (Exhibit 1 to Blatt declaration.)⁹ Moreover, it is clear from the
 15 underlying pleadings that the Schnabel wall was not the only alleged source
 16 of water intrusion.

17
 18 None of these additional claims arose out of Schnabel's operations.
 19

20
 21 ⁹ In his own cross-complaint, Blatt alleged that the underlying plaintiffs had made a
 22 lengthy list of claims against him: "Plaintiffs allege, among other things, that [the
 23 condominiums] had the following defects: required hold-downs were missing from the
 24 elevator shaft as was required shear wall; walls were missing sill plates and were not built
 25 to plan; steel beaming used [sic] that failed to comply with design plans; through bolts
 26 were missing as was wood beam packing; steel beams were not correctly packed; welded
 27 bolts were used instead of through bolts; hold down straps for shear to beam attachment
 28 missing; excess plywood packing caused 'speedbumps'; missing beam bolts; improper
 stair risers; shear walls incorrectly connected to joist blocking; garage walls not built to
 plans but built too low; no foundations installed as required in plans; tie downs incorrectly
 installed; missing deck flashing; missing ceiling vents [sic] roof showed signs of failure;
 improper number of roof drains; vapor barriers missing; insufficient drainage because of
 the lack of exit routes; stair cases did not meet code requirements; fire sprinkler system
 failed to meet code and other defects unknown at this time." (Exhibit 8 to Foreman
 declaration, p. 9, para. 40.)

1 None of these claims was even potentially covered under the policy, and
2 Liberty Mutual is now entitled to reimbursement for the defense costs
3 incurred to defend those claims.
4

5 The fact that factual allegations are incorporated from one cause of
6 action into the next does not transubstantiate an uncovered *claim* into a
7 covered one. If that were the case, there would be no call for the distinctions
8 made in Buss; every lawsuit would be potentially covered in its entirety if
9 there was but a single potentially-covered claim incorporated from cause of
10 action to cause of action. Besides the fact that such a result is simply silly, it
11 flies in the face of the well-settled authority that coverage is not determined
12 by the manner in which the plaintiff frames the complaint against the insured.
13 The third party cannot be the arbiter of the policy's coverage. Montrose,
14 supra, 6 Cal.4th at 295.
15

16 Liberty Mutual is entitled to a summary adjudication that it had no
17 obligation to pay for "claims" not arising out of Schnabel's operations, and
18 that it is entitled to reimbursement from Mr. Blatt for any sums spent
19 defending such claims. This is the essence of the holding in Buss, and the
20 underlying pleadings make it readily apparent that there were many
21 uncovered claims.
22

23 IV. LIBERTY MUTUAL IS ENTITLED TO RECOVER 24 PREJUDGMENT INTEREST. 25

26 Defendant does not challenge the fact that Liberty Mutual is entitled to
27 prejudgment interest on the amounts recovered from Mr. Blatt. Thus, the
28 court should summarily adjudicate Liberty Mutual's right to recover such

1 prejudgment interest.

2
3 **V. LIBERTY MUTUAL'S CLAIMS HAVE BEEN**
4 **ESTABLISHED BY REQUESTS FOR ADMISSION NOW**
5 **DEEMED ADMITTED.**
6

7 Liberty Mutual served Mr. Blatt with requests for admissions in July.
8 Responses to those requests for admissions became overdue in September.
9 (Supplemental Bennington Declaration.) Under the provisions of Rule 36,
10 they were deemed admitted at that time. Defendant has not sought relief
11 from his default.
12

13 The requests deemed admitted establish that Blatt is "legally obligated
14 to reimburse Liberty Mutual for the \$300,303.85 in attorney's fees and costs
15 awarded against Blatt in the Gabbert action," and that " Blatt is legally
16 obligated to reimburse Liberty Mutual for the \$198,344.88 in fees and costs it
17 incurred while defending Blatt against the claims made in the Gabbert
18 action."
19

20 **CONCLUSION**
21

22 The jury verdict in the underlying case established that none of the
23 claimed damages arose out of Schnabel's operations. Moreover, the
24 attorney's fees awarded against Mr. Blatt were based on his breach of his
25 contract with the underlying plaintiffs, and did not arise out of any tortious
26 conduct by Schnabel. Thus, Liberty Mutual had no duty to defend Mr. Blatt
27 or to pay any defense costs, including the awards to the underlying plaintiffs,
28 incurred after the verdict was rendered.

1 The jury verdict also established, as a matter of law, that there had
2 never been a potential for coverage under the policy for any of the claims
3 made against Mr. Blatt. Liberty Mutual is therefore entitled to reimbursement
4 of *all* defense fees and costs incurred in Mr. Blatt's defense. Solely in the
5 alternative, Liberty Mutual is entitled to recover those fees and costs incurred
6 in the defense of uncovered claims not arising from Schnabel's operations.

7
8 Finally, Liberty Mutual is entitled to prejudgment interest on all amounts
9 it recovers.

10
11 Plaintiff respectfully asks that the court grant the motion and enter
12 judgment in favor of Liberty Mutual for the amounts requested.

13
14 Dated: October 16, 2007

KRING & CHUNG, LLP

15
16 By: 

J. Christopher Bennington
Ronald J. Skocypec
Attorneys for Plaintiff
LIBERTY MUTUAL INSURANCE
COMPANY

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, the undersigned, am employed in the County of Orange, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 38 Corporate Park, Irvine, CA 92606-5105.

On October 16, 2007, I served true copies of the foregoing document(s) described as **REPLY BRIEF IN SUPPORT OF LIBERTY MUTUAL'S MOTION FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION** on the interested parties in this action, addressed as follows:

Ronald D. Foreman, Esq.
Russell F. Brasso, Esq.
Foreman & Brasso
930 Montgomery St., Ste. 600
San Francisco, CA 94133

☒ BY E-MAIL: By transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 16, 2007, at Irvine, California.



MICHELLE BENNETT

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Attorneys for Plaintiff
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

LIBERTY MUTUAL INSURANCE
COMPANY,

Plaintiff,

vs.

MICHAEL T. BLATT,

Defendant.

Case No. C 06 2022 SC

Date: October 26, 2007

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**SUPPLEMENTAL DECLARATION
OF J. CHRISTOPHER
BENNINGTON SUBMITTED IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Hon. Samuel Conti

Trial: November 19, 2007

J. Christopher Bennington declares:

1. I am an attorney licensed to practice before all of the courts of the state of California. I am also admitted to the Northern District. I am associated with the firm of Kring & Chung, counsel for Plaintiff Liberty Mutual Insurance Company in the instant litigation. I could competently testify as to the following matters if called upon to do so by the court.

///

///

1 2. Attached as Exhibits G and H are copies of letters from defendant's
2 counsel, Ronald Foreman. The letters are dated June 1, 2004 and June 15,
3 2004 respectively. In these letters, Mr. Foreman demands on behalf of Mr.
4 Blatt that Liberty Mutual pay all parts of the judgment entered against Mr.
5 Blatt in the underlying litigation, including the awards for attorneys fees and
6 costs.

7
8 3. On or about July 18, 2007, I had served on Mr Blatt's counsel a set
9 of requests for admissions and corresponding interrogatory. Attached as
10 Exhibit I is a true and correct copy of the requests for admissions.

11
12 4. The last extension of time to respond to the requests for admission
13 expired on or about September 7, 2007. I reminded Mr. Foreman by email of
14 the need to respond to the discovery or otherwise resolve the discovery
15 situation on August 31, 2007, September 14, 2007, September 18, 2007,
16 September 19, 2007, October 2, 2007 and October 4, 2007. In that last
17 email, I told Mr. Foreman that the requests were deemed admitted under the
18 federal rules. We also spoke about the issue during a number of telephone
19 conversations, yet no responses to the discovery was sent to this office until
20 late on October 4, 2007.

21
22 I declare under penalty of perjury under the laws of the United States of
23 America that foregoing is true and correct. Executed October 16, 2007 at
24 Westlake Village, California.

25
26
27 
28 _____
J. Christopher Bennington

Exhibit "G"

FOREMAN & BRASSO

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Fax: 415.781.8030
www.foremanandbrasso.com

Marin Office
21 Tamal Vista Boulevard, Suite 174
Corte Madera, CA 94925

June 1, 2004

Via Facsimile and U.S. Mail

925.224.9976 Page 1

Michael Barnette, Sr. Technical Claims Specialist
Liberty Mutual Insurance Company
P.O. Box 9118
Pleasanton, CA 94566

Re: Your Insured: Schnabel Foundation Co.
Your File No.: P602-070876-01
Policy No. TB1-131-011670-397

Dear Mike,

Last week, I received a Proposed Judgment from James Gabbert and Michael Lincoln. I believe the form of the Proposed Judgment is incorrect. I wrote Mr. Anolik the enclosed letter and forwarded the enclosed Proposed Amended Judgment. Ultimately, the Court will enter judgment against defendants Michael and Catherine Blatt. As you are aware, the Court found that the damages awarded by the jury were property damage, even though we argued to the contrary. In denying our Motion for Judgment Notwithstanding the Verdict, the Court stated that the Verdict was supported by the facts and rejected our argument that the plaintiffs did not meet the *Aas* test.

The plaintiffs have a judgment for damages in the amount of \$144,428.60, attorneys fees in the amount of \$286,669 and costs in the amount of \$13,634.85, totaling \$444,730.25. Michael and Catherine Blatt hereby make demand, that under the terms of the Liberty Mutual insurance policy, that it pay \$444,730.25, to plaintiffs James Gabbert and Michael Lincoln, including any interest which has accrued thereon.

Very truly yours,
FOREMAN & BRASSO

Ronald D. Foreman

RDF/dlm
cc: Clients
E:\FAB\Blatt\Correspondence\Barnette 060104.wpd

Exhibit "H"

FOREMAN & BRASSO

ATTORNEYS AT LAW

930 Montgomery Street, Suite 600
San Francisco, California 94133

Tel: 415.433.3475

Fax: 415.781.8030

www.foremanandbrasso.com

Ronald D. Foreman
Russell F. Brasso
Jacqueline C. Hamilton

Marin Office
21 Tamal Vista Boulevard, Suite 174
Corte Madera, CA 94925

June 15, 2004

Via Facsimile Only

925-734-0916 Pages: 1

Michael Barnette, Sr. Technical Claims Specialist
Liberty Mutual Insurance Company

P.O. Box 9118

Pleasanton, CA 94566

Re: Your Insured: Schnabel Foundation Co.
Your File No.: P602-070876-01
Policy No. TB1-131-011670-397

Dear Mike,

As you know, I wrote to you on June 1, 2004 making demand that the Judgment, attorney's fees and costs be paid pursuant to the terms of the insurance policy. I have not had a reply. Last week the plaintiffs filed their Court Orders arising out of the denial of the JNOV Motion and the granting and denial in part of the attorney's fees and costs bill motions. The recording of the Judgment in favor of the plaintiffs and against my clients will have adverse repercussions on their real estate business and their ability to borrow money. They don't want the Judgment recorded, but if it is recorded they want it satisfied promptly. I have not heard from the insurer or from you regarding the June 1, 2004 demand for payment of the Judgment, attorney's fees and costs. Please let me know the status of the company's review, when the plaintiffs can expect payment and, please provide a certified copy of the Schnabel Foundation Co.'s insurance policy issued by Liberty Mutual Insurance Company.

Very truly yours,
FOREMAN & BRASSO

Dictated, but not read

Ronald D. Foreman

RDF/dlm

cc: Clients - Via Facsimile Only - 415.331.9377

S:\FAB\Blatt\Correspondence\Barnette 061504.wpd

Exhibit "I"

Ronald J. Skocypec, Bar No. 72690
J. Christopher Bennington, Bar No. 105432
KRING & CHUNG, LLP
920 Hampshire Road
Suite A15
Westlake Village, CA 91361
Telephone: (805) 494-3892
Facsimile: (805) 494-3914
Attorneys for Plaintiff
LIBERTY MUTUAL INSURANCE COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

LIBERTY MUTUAL INSURANCE
COMPANY,

Plaintiff,

vs.

MICHAEL T. BLATT,

Defendant.

) Case No. C 06 2022 SC

) **REQUEST FOR ADMISSIONS**
) **(SET ONE) PROPOUNDED BY**
) **PLAINTIFF LIBERTY MUTUAL**
) **INSURANCE COMPANY TO**
) **DEFENDANT MICHAEL T.**
) **BLATT**

PROPOUNDING PARTY: Liberty Mutual Insurance Company

RESPONDING PARTY: Michael T. Blatt

SET NO.: One

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, plaintiff Liberty Mutual Insurance Company hereby requests that defendant Michael T. Blatt admit the truth of the following statements:

REQUEST FOR ADMISSION NO. 1:

That Michael T. Blatt ("Blatt") tendered his defense in the case of Gabbert v. Blatt, Marin County Superior Court case CV 020477 ("Gabbert action") under the terms of policy TB1-131-011670-397 issued by Liberty Mutual Insurance Company ("Liberty Mutual") in favor of Schnabel Foundation Company ("Schnabel").

///



1 **REQUEST FOR ADMISSION NO. 2:**

2 That Blatt was an additional insured under the terms of policy TB1-131-
3 011670-397.

4 **REQUEST FOR ADMISSION NO. 3:**

5 That Blatt was not a named insured under the terms of policy TB1-131-
6 011670-397.

7 **REQUEST FOR ADMISSION NO. 4:**

8 That as an additional insured under the terms of policy TB1-131-011670-397,
9 Blatt was only covered against claims that arose out of the operations of Schnabel or
10 out of premises owned by or rented to Schnabel.

11 **REQUEST FOR ADMISSION NO. 5:**

12 That the jury in the Gabbert action found that Schnabel was not liable to any
13 other party.

14 **REQUEST FOR ADMISSION NO. 6:**

15 That the court in the Gabbert action awarded attorney's fees and costs in favor
16 of plaintiffs and against Blatt in the amount of \$300,303.85.

17 **REQUEST FOR ADMISSION NO. 7:**

18 That Liberty Mutual paid on behalf of Blatt the \$300,303.85 in attorney's fees
19 and costs awarded in favor of plaintiffs in the Gabbert action.

20 **REQUEST FOR ADMISSION NO. 8:**

21 That Liberty Mutual paid at least \$198,344.88 in fees and costs while
22 defending Blatt against the claims made in the Gabbert action.

23 **REQUEST FOR ADMISSION NO. 9:**

24 That in accepting Blatt's tender of defense in the Gabbert action, Liberty
25 Mutual reserved its rights to seek reimbursement of all fees and costs incurred in
26 defending Blatt against claims not covered by policy TB1-131-011670-397.

27 ///

28 ///



REQUEST FOR ADMISSION NO. 10:

That because Schnabel was found not liable to any party in the Gabbert action, the claims against Blatt did not arise out of Schnabel's operations or out of premises owned by or rented to Schnabel.

REQUEST FOR ADMISSION NO. 11:

That because Schnabel was found not liable to any party in the Gabbert action, Liberty Mutual had no obligation to defend Blatt against the claims raised in that litigation.

REQUEST FOR ADMISSION NO. 12:

That because Schnabel was found not liable to any party in the Gabbert action, Liberty Mutual is entitled to reimbursement for sums incurred in defending Blatt against the claims raised in that litigation.

REQUEST FOR ADMISSION NO. 13:

That Blatt is legally obligated to reimburse Liberty Mutual for the \$300,303.85 in attorney's fees and costs awarded against Blatt in the Gabbert action.

REQUEST FOR ADMISSION NO. 14:

That Blatt is legally obligated to reimburse Liberty Mutual for the \$198,344.88 in fees and costs it incurred while defending Blatt against the claims made in the Gabbert action.

Dated: July 18, 2007

KRING & CHUNG, LLP

By: 

J. Christopher Bennington

Ronald J. Skocypec

Attorneys for Plaintiff

LIBERTY MUTUAL INSURANCE
COMPANY

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, the undersigned, am employed in the County of Orange, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 38 Corporate Park, Irvine, CA 92606-5105.

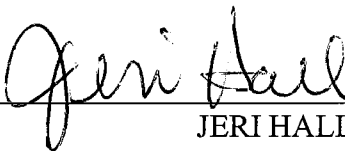
On July 18, 2007, I served true copies of the foregoing document(s) described as **REQUEST FOR ADMISSIONS (SET ONE) PROPOUNDED BY PLAINTIFF LIBERTY MUTUAL INSURANCE COMPANY TO DEFENDANT MICHAEL T. BLATT** on the interested parties in this action, addressed as follows:

Ronald D. Foreman, Esq.
Russell F. Brasso, Esq.
FOREMAN & BRASSO
930 Montgomery St., Suite 600
San Francisco, CA 94133
Tel.: (415) 433-3475
Fax: (415) 781-8030

☒ BY U.S. MAIL: The documents were placed in sealed, addressed envelopes on the above date and placed for collection and mailing at my place of business. I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 18, 2007, at Irvine, California.


JERI HALL

Ronald J. Skocypec, Bar No. 72690
J. Christopher Bennington, Bar No. 105432
KRING & CHUNG, LLP
920 Hampshire Road
Suite A15
Westlake Village, CA 91361
Telephone: (805) 494-3892
Facsimile: (805) 494-3914

Attorneys for Plaintiff
LIBERTY MUTUAL INSURANCE COMPANY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

LIBERTY MUTUAL INSURANCE
COMPANY,

Plaintiff,

vs.

MICHAEL T. BLATT,

Defendant.

Case No. C 06 2022 SC

**INTERROGATORIES (SET ONE)
PROPOUNDED BY PLAINTIFF
LIBERTY MUTUAL INSURANCE
COMPANY TO DEFENDANT
MICHAEL T. BLATT**

PROPOUNDING PARTY: Liberty Mutual Insurance Company

RESPONDING PARTY: Michael T. Blatt

SET NO.: One

Pursuant to Rule 33 of the Federal Rules of Civil Procedure and Rule 33-2 of the local rules of the Northern District of California, plaintiff Liberty Mutual Insurance Company hereby requests that defendant Michael T. Blatt answer the following interrogatory:

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///

///

///



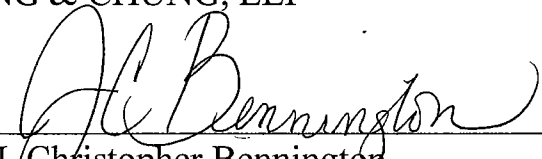
INTERROGATORY NO. 1:

1. With regard to the requests for admissions served concurrently with this interrogatory, please set forth the basis for denying any such request in whole or in part.

Dated: July 18, 2007

KRING & CHUNG, LLP

By:


J. Christopher Bennington
Ronald J. Skocytec
Attorneys for Plaintiff
LIBERTY MUTUAL INSURANCE
COMPANY



PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, the undersigned, am employed in the County of Orange, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 38 Corporate Park, Irvine, CA 92606-5105.


On July 18, 2007, I served true copies of the foregoing document(s) described as **INTERROGATORIES (SET ONE) PROPOUNDED BY PLAINTIFF LIBERTY MUTUAL INSURANCE COMPANY TO DEFENDANT MICHAEL T. BLATT** on the interested parties in this action, addressed as follows:

Ronald D. Foreman, Esq.
Russell F. Brasso, Esq.
FOREMAN & BRASSO
930 Montgomery St., Suite 600
San Francisco, CA 94133
Tel.: (415) 433-3475
Fax: (415) 781-8030

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 18, 2007, at Irvine, California.


JERI HALL

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I, the undersigned, am employed in the County of Orange, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is 38 Corporate Park, Irvine, CA 92606-5105.

On October 16, 2007, I served true copies of the foregoing document(s) described as **SUPPLEMENTAL DECLARATION OF J. CHRISTOPHER BENNINGTON SUBMITTED IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** on the interested parties in this action, addressed as follows:

Ronald D. Foreman, Esq.
Russell F. Brasso, Esq.
Foreman & Brasso
930 Montgomery St., Ste. 600
San Francisco, CA 94133

☒ BY E-MAIL: By transmitting a true copy of the foregoing document(s) to the e-mail addresses set forth on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 16, 2007, at Irvine, California.



MICHELLE BENNETT